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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 223

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SWIFT & COMPANY,

Appellants,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., AND THE CLEVELAND UNION STOCK YARDS COMPANY,

Appellees.

BRIEF OF APPELLANT SWIFT & COMPANY IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM.

JOHN P. STALEY,
Attorney for Appellant Swift & Company.

Chicago, Illinois,
August 29, 1947.

THE DUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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STATUTES.

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PRELIMINARY STATEMENT.

Appellees have filed a motion to affirm the United States District Court's decree or dismiss the appeal herein solely on the alleged ground that the questions on which the decision of the cause depends are so unsubstantial as not to warrant further argument. They say that the lower court's conclusions of law are so sound that reasonable minds can come to no other conclusion.

Appellant Swift & Company asserts that the questions on which the cause depends are not only substantial but are of greater than usual importance. The lower court's

decision, if permitted to stand, would open the door to inequality in the treatment of shippers, defeat one of the principal objects of the act, hinder the administration of the act by the Interstate Commerce Commission, subject shippers to the arbitrary whims of railroads and lessors of railroad tracks, and establish serious limitations to various sections of the act.

The lower court's decision does violence to the plain language of parts of the act. It results in some measure from a substitution by the court of its own judgment for that of the Commission on purely administrative matters.

The questions involved have never been ruled upon by the Supreme Court in any case embracing comparable facts.

The representations contained in appellants' jurisdictional statement herein, under this court's rule 12, should in themselves adequately refute any contention that the questions involved are not substantial. The court should also note that extensive consideration was given to this case by the Commission, and its report reveals painstaking attention to facts and law.

It might also be here observed that appellees' motion and brief fail to demonstrate that the questions involved are not substantial, but rather they only add confusion to already complicated facts and appear to represent appellees' contentions on the merits.

Within the limited scope of this brief, Swift & Company can merely touch upon the main questions and demonstrate only that the questions raised are substantial. A full and complete hearing, with opportunity to present adequate briefs and oral argument, is necessary to proper consideration of the merits.

The facts are adequately set forth in the jurisdictional statement and need not be repeated here.

BASIC ISSUES

Appellees do not correctly state the questions involved. Their purported statement of issues is entirely erroneous and misleading.

The real issue is whether a common carrier by railroad, subject to the Interstate Commerce Act, which uses as a part of its terminal facilities in Cleveland, Ohio, 1619 feet of track leased by it from the Cleveland Union Stock Yards Company, may violate the duties with respect to the delivery of freight imposed upon the carrier by the Interstate Commerce Act, because the lessor of the track, Cleveland Union Stock Yards Company, demands such violation of law by the lessee railroad common carrier.

The issue may be stated in other language as follows:

Is a railroad excused from conforming to the requirements of the Interstate Commerce Act merely because a short section of the track it uses in performing its common carrier functions is not owned by it but is leased from someone else?

The situation is that the stock yards company leased track 1619 to the New York Central, knowing that the railroad was a common carrier subject to numerous obligations imposed upon it by the Interstate Commerce Act and that the railroad had been and intended to continue using the track in the performance of its common carrier functions under the Interstate Commerce Act. The stock yards company sought to interfere with the performance by the New York Central of its obligations under the act. The Commission ordered the New York Central to perform such statutory obligations. This result was the natural, obvious, and foreseeable consequence of the stock yards company's own acts and conduct. Yet appellees seek to stigmatize the Commission's order in their state-

ment of issues by generous use of such catch phrases as "private sidetrack", "trespass", "virtual appropriation", "without compensation", "to the use and benefit of Swift & Company", and other language which obscures the real facts and issues.

The appellees intimate that the Commission has ordered the stock yards company to desist from asserting and exercising complete ownership and control over its property. As a matter of fact, the stock yards company was not asserting or exercising complete ownership and control but had granted to the New York Central an important incident of ownership, the right to use and occupy the track, and had permitted the track to be devoted to a public use for many years.

Appellees refer to track 1619 as the "private sidetrack of the stock yards." This is plain misuse of simple words of the English language. As stated by the Commission (266 I.C.C. 55, 65), "the agreed as well as actual use by the New York Central of the Stock Yards' track 1619 is not as a mere private track but is as an essential part of its spur No. 245" and, at page 70, "track 1619 is now, and for years has been, devoted to a public use". Obviously track 1619 is not "a private sidetrack."

To say that the Commission's order "appropriated" property of the stock yards is utterly untrue. Not one word will be found in the Commission's report and order which could be construed as ordering an appropriation. The Commission simply considered the evidence, made findings of fact, as it is obligated by law to do, and ordered the defendants to do what the act requires them to do. The stock yards company appropriated track 1619 to the use of the New York Central for the purpose of obtaining, at railroad expense, maintenance of all its tracks at the stock yards. Use of the track for live stock was an unavoid-

able consequence resulting from appellees' own voluntary action, and appellees now unjustly accuse the Commission of appropriating the track.

Appellees use the words "without compensation". No suggestion has ever been made that the stock yards company should not receive just compensation for the use of its track. But Swift is not using the track. The New York Central is using it. If the railroad considers that the rates now charged for transportation to and from the seven industries served over track 1619 are inadequate, the normal procedure would be for the railroad to publish new tariffs containing higher rates. If the higher rates are protested, the Commission will, as it normally does, determine the reasonableness and the lawfulness of the rates. The use by appellees of the words "without compensation" is unjustified.

Appellees also infer that the Commission's order brings about a devotion of the track "to the use and benefit of Swift & Co." It would be a novel contention that a railroad should be excused from performing its duty under the Interstate Commerce Act simply because performance of the duty might benefit someone. Once the principle becomes clear that the railroad is obligated to transport live stock over the track, the other six industries will be in a position to benefit to the same extent as Swift & Company. The order will operate to the benefit of every person in the United States shipping live stock to Swift & Company. The use of such words as "to the use and benefit of Swift & Company" in appellants' statement of issues is misleading.

Obviously the statement of the issues in appellees' brief is incorrect and fallacious. The real issue is as stated above by this appellant.

ARGUMENT.

Authorities Cited by Appellees Not Applicable.

Generally speaking, the facts in the cases cited by appellees are so widely different from those involved here that the distinctions are apparent at first glance. It will be noted that none of such cases were cited by the lower court.

Not one of the cases cited involved a situation where a railroad, in the performance of its common carrier obligations under the Interstate Commerce Act, made public use of a track leased from a third party as a means of moving traffic from one track owned by the railroad to another track which it also owns.

Appellees infer, at page 8 of their brief, that the Commission was without authority to issue its order herein because section 1 (22) of the Interstate Commerce Act provides in substance that the authority conferred upon it shall not extend to the "construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State". This proceeding, however, does not involve such construction or abandonment but rather involves use and regulation of the track which are not affected or proscribed by section 1 (22).

In *Limits Industrial Building Corp.* v. *B & O. C. Term. R. Co.*, 258 I.C.C. 438, *Sholl Bros.* v. *P. & P. W. Ry. Co.*, 276 Ill. 267, and *Alabama Cent. R. Co.* v. *Alabama Public Service Com'n*, 200 Ala. 536, 76 South. 862, cited by appellees, the industries served did not have direct connections to public tracks owned by the railroad furnishing the service as at Cleveland.

In *Certain-Teed Products Corp.* v. *C., R. I. & P. Ry. Co.*, 68 I.C.C. 260, cited at page 16 of appellees' brief, the car-

rier serving complainant did not have any agreement for use of the track there involved, but complainant and two other industries rented the track from its owner for their own private use.

Fort Worth Stockyards Co. v. *Brown*, 161 S.W. (2d) 549, cited by appellees, does not even relate to railroad property but to the use of a runway in a public stock yards. The *Packers and Stockyards Act* (7 U.S.C.A. secs. 181-229) contains no definition of stock yards property similar to the definition of "railroad" contained in section 1 (3) (a) of the Interstate Commerce Act.

Pennsylvania R. Co. v. *Public Utilities Com.*, 298 U. S. 170, 80 L. ed. 1130, cited at page 22 of appellees' brief, involved the entirely different question whether an order of the Ohio Public Utilities Commission, directing railroad companies to observe intrastate rates in switching and delivering at a destination within the state cars of coal brought into the state by private facilities and first delivered to a common carrier for transportation within the state, was valid. Language used in determining that question is of no value whatever here.

In connection with *General Amer. T. Car Corp.* v. *El Dorado Term. Co.*, 308 U. S. 422, 84 L. ed. 361, cited at page 24 of appellees' brief, the court should note that it was there held that a matter involving primary jurisdiction of the Commission was in issue. Subsequently the Commission did make its findings and allowances for privately owned tank cars in *Allowances for Privately Owned Tank Cars*, 258 I.C.C. 371. In *El Dorado Oil Works* v. *United States*, 328 U. S. 12, 90 L. ed. 1053, the Supreme Court upheld the Commission's findings although they operated solely against a person who was not a common carrier by railroad. The Supreme Court's decision in the latter

case could only have been under the provisions of the *Elkins Act*.

The facts in the other cases cited by appellees are so utterly dissimilar to those here that specific mention of each case is unnecessary.

Important Questions Involved.

The situation here is that the railroad uses track 1619 as a link in its tracks by which it performs its ordinary common carrier service. Not one word in the Interstate Commerce Act indicates that the Commission has any less power to regulate merely because the track is not owned by the railroad. In effect, the decision of the lower court would read out of the act that portion of section 1 (3) (a) providing that the term "railroad" shall include "* * * all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals and terminal facilities * * *". If the decision of the lower court is correct, then the Commission is without power to regulate transportation over any other track used but not owned by a railroad. Undoubtedly there are numerous tracks in the United States which are used but not owned by railroads.

If the power to regulate turns on the question whether the track was used merely as a "private sidetrack" or as part of the facilities by which the railroad performs its common carrier functions, then obviously the lower court erred grievously in substituting its judgment for that of the Commission contrary to the general doctrine set forth in *United States* v. *Louisville & N. R. Co.*, 235 U. S. 314, 320, 321, 59 L. ed. 245, 251, to the effect that primary jurisdiction is in the Commission to make findings of that

kind and that courts should not substitute their judgment for that of the Commission. Other cases to the same effect are too numerous to mention.

Although the court, in its opinion, does not profess to make any findings under sections 1 (6), 1 (9), or 3 (1) of the Interstate Commerce Act, nevertheless it will be noted that in its findings of fact and conclusions of law it does substitute its judgment for that of the Commission with reference to such matters and even goes to the extent of finding that delivery of live stock to Swift & Company would prefer Swift & Company over certain other industries.

Obviously the limitations sought to be imposed on the Commission by the lower court would greatly reduce the effectiveness of those sections for preventing discriminations and unreasonable practices, and the shippers and consignees would be placed at the mercy of the railroad and the track lessor in any case where a railroad uses track which it leases instead of owns.

At 266 I.C.C. 55, 62, *et seq.*, the Commission sets forth reasoning and authorities which offer the strongest kind of evidence that the decision of the Commission, rather than that of the lower court, is correct.

Numerous other authorities which this appellant will cite in its brief on the merits support the Commission's order and condemn the decision of the lower court.

CONCLUSION.

This case involves questions of great importance to shippers, consignees, and the public generally, and to the Interstate Commerce Commission in administering the act. The motion of appellees to affirm or dismiss should be denied.

Respectfully submitted,

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August 29, 1947.